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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 571

MICHAELS ENTERPRISES, INC., and
JAMES A. MICHAELS, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on August 28, 1963.

### OPINION BELOW.

The opinion of the Court of Appeals (Appendix, *infra*) is not yet reported.

## JURISDICTION.

The judgment of the Court of Appeals was entered on August 28, 1963. A duly filed motion for rehearing was overruled on September 20, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED.

1. Whether Section 5603 (b) of the Internal Revenue Code contains the element of intent, where its predecessor statute had been held to contain intent and the penalty for each violation thereof is imprisonment for one year and a fine of $1,000.00.

2. Whether one may be convicted of the crime of failing to produce records for inspection while at the same time being convicted of the crime of failing to keep and maintain the same records, each in violation of the same statute.

## STATUTES INVOLVED.

26 U. S. C. 5124 (a): **Receipts**—Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines and beer received.

26 U. S. C. 5146: (a) **Preservation and inspection of records**—Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may, by regulations, prescribe and shall be kept available for inspection by any internal revenue officer during business hours.

(b) **Entry of premises for inspection**—The Secretary or his delegate may enter, during business hours, the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U. S. C. 5603: (a) **Fraudulent noncompliance**—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, with intent to defraud the United States, shall—

(1) fail to keep any such document or to make required entries therein; or

* * * * * * *

(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) **Failure to comply**—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States shall

(1) fail to keep any such document or to make required entries therein; or

* * * * * * *

(5) fail or refuse to preserve or produce any such document as required by this chapter or regulations issued pursuant thereto;

or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

Sec. 5620, Internal Revenue Code of 1954:

**Penalty and forfeiture for false or omitted entries in distiller's books and records.**

Whenever any false entry is made in, or any entry required to be made is omitted from the records required under Section 5197 (a) (1) with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in such records, or to mislead in reference thereto; or any distiller omits or refuses to provide such records, or cancels, obliterates, or destroys any part of such records or any entry therein, with intent to defraud, or permits the same to be done, or willfully refuses to produce such records when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States. And every person who makes such false entry, or omits to make any entry required to be made, with intent aforesaid, or who causes or procures the same to be done, or fraudulently cancels, obliterates, or destroys any part of said records, or any entry therein, or willfully fails to produce such records, shall be fined not more than $5,000, and imprisoned not more than 2 years.

Sec. 5621, Internal Revenue Code of 1954:

**Penalty relating to records and returns of distiller as wholesaler dealers, rectifiers, and wholesale dealers.**

Every distiller, rectifier, and wholesale liquor dealer who refuses or neglects to keep the records required

under Sections 5197 (a) (2), 5285 (b) or 5114 (a) in the form prescribed by the Secretary or his delegate, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not more than $5,000, and imprisoned not more than 3 years. Every distiller, rectifier, and wholesale liquor dealer who refuses or neglects to render transcripts or summaries of such records in the form required by the Secretary or his delegate shall, upon conviction, be fined not more than $100 for each such neglect or refusal.

Sec. 5692, Internal Revenue Code of 1954:

**Penalty relating to records of retail liquor dealers.**

For each willful violation of the provisions of section 5124 the retailer shall be subject to a fine of $25.

## STATEMENT.

The petitioners, Michaels Enterprises, Inc., and James A. Michaels, Jr., its president, were charged in a two-count indictment. The first count alleged that the corporation was "a person required to keep and file records, returns, reports, summaries, transcripts and other documents," and that on August 30, 1961, the petitioners "did fail and refuse to preserve and produce such documents as required to be kept" by law when so demanded for inspection by investigators of the Alcohol Tax Unit (T. 249-250).

The second count charges that the corporation was "a person required to keep and file records, returns, reports,

summaries, transcripts and other documents," and that the petitioners, between August 29, 1959, and August 31, 1961, "did fail to keep such documents and make required entries therein, to-wit, a record in book form of all distilled spirits, wines and beer received, or, in the alternative, to keep all invoices of, and bills for, all distilled spirits, wine and beer received by" the petitioner corporation (T. 250-251).

The evidence adduced by the Government may be summarized as follows: On August 29, 1961, investigators of the Alcohol and Tobacco unit went to Michaels Bar and Restaurant to conduct an inspection (T. 18). Petitioner Michaels was not present (T. 20), being on vacation (T. 43). The bartender told them that he did not know where the liquor invoices were kept (T. 23), and that he did not have a key to the basement (T. 22, 23). Petitioners' attorney told them that petitioner Michaels would return from vacation the next day (T. 24, 45), and asked them to then complete their inspection (T. 24, 47).

The next day, August 30, the inspectors returned (T. 25, 76) and asked petitioner Michaels for invoices of liquor purchases, who replied that he would have to dig them up (T. 25, 28). He unlocked the basement, except one room, which they inspected (T. 26, 29). He stated that he did not have a key to the locked room (T. 28), but would see his lawyer and return with a key (T. 30). Although the inspectors received a telephone call from petitioners' attorney (T. 30, 48), petitioner Michaels did not return that day and the inspectors remained until midnight (T. 30, 77).

Early the next afternoon petitioner and his attorney arrived and admitted the inspectors into the locked room (T. 67-68). One cardboard box containing 37 liquor invoices was found in the basement proper, but not in the locked room, on top of some old furniture (T. 56, 68). No

more invoices could be found and petitioner told them that they had been damaged in the basement flood and destroyed (T. 36, 50-51, 61-62, 82). From the 37 invoices, the inspectors recorded the names of the liquor companies from which petitioners purchased liquor (T. 61, 73, 79). They completed the inspection that day (T. 81) and never did request any additional information or invoices (T. 83). The Government adduced evidence from such wholesale liquor dealers as to petitioners' liquor purchases (T. 84-116), as they are required to maintain records of all sales (T. 88).

The petitioners adduced extensive evidence. Petitioner Michaels testified that he didn't know of the requirement to save the invoices for the Federal Government (T. 202),[1] but it was his practice to keep them for bookkeeping purposes (T. 202-203).

When whisky, as well as other supplies, was delivered to the establishment someone would sign the invoice (T. 131-132, 198) with the copy being placed on the back bar (T. 139-141, 199). Once or twice a month the accountant picked up the current invoices, check stubs, etc. (T. 163-168, 200). He kept the permanent records for the business, for convenience, as is customary, at his office (T. 165, 170, 174). After the entries were made in the permanent books (T. 163-168, 170, 174), the initial records including invoices, were returned to the Restaurant (T. 167). Among the books was a disbursement journal which recorded all purchases of liquor by check number, date paid, payee (company from which purchased), and class of purchase, such as food, liquor, supplies, etc. (T. 163-164, 168, 169).

[1] Nor was there any evidence to the contrary, that is, that the defendant Michaels had been previously informed of this requirement. Moreover, the evidence was undisputed that the defendants kept good books which set out all of their purchases, refuting any inference that the defendants were attempting to hide their purchases of whisky (T. 235).

The journal was introduced into evidence by the defense (T. 169).

Petitioner Michaels testified that on June 23, 1961, water backed into the basement from the sewer to a level of two to four inches (T. 194-195), damaging the bills and invoices, which were later destroyed (T. 195-197). He was corroborated by the maintenance superintendent of the building (T. 146-160). The sewer problem was repaired by the Dependable Plumbing Company (T. 197), corroborated by their records (T. 142-145).

Petitioner, corroborated by his wife, testified that on August 27, 1961, the family drove to their farm about 100 miles from St. Louis (T. 124-125, 183, 188), returning on August 30 (T. 126, 184). Upon arriving at the restaurant about 4 p. m. (T. 126, 184), two inspectors were present who asked to inspect liquor invoices and the basement (T. 184-186). After inspecting the basement, petitioner Michaels told the inspectors that he could not find the key to the locked room, and that the invoices may have been destroyed in the flood (T. 121-122, 185-187). The inspector asked petitioner Michaels to go after the key (T. 187). The key could not be found at his home (T. 126, 187), and petitioner and his wife drove to the farm where it was found in a coat which he had left there (T. 126-127, 187-188). The key was delivered to the inspectors at the restaurant the next day (T. 190). The invoices were not in the room (T. 205), and petitioner again explained that they had been destroyed in a flood (T. 191). The inspectors never requested any other records (T. 201).

On rebuttal, the government adduced testimony that certain invoices were missing at the time of the inspection which would have been received by petitioners from wholesalers after the flood (T. 207-212, 225-226). The court below was in error in stating that "at the trial of this case, certain 'invoices' for distilled spirits were introduced into

evidence by appellants" (App. 7), as petitioners did not introduce any invoices (T. 11). Nor was there any evidence, contrary to the statements of the Court below (App. 8) that any invoices existed other than the 37 which were inspected.

The instructions did not contain any verdict-directing instruction nor any instruction setting forth the elements of the offense. The Court simply read the various statutes involved and the indictment (T. 247-251) and gave an instruction, offered by the defense, on accident (T. 251-253). There was no instruction on intent. The only reference even to the word "knowingly" was in stating the Government's position, not the elements of the offense (T. 251). Shortly after the jury retired to deliberate, it requested the exhibits showing sales invoices from the various liquor dealers and a "copy of the law stating the manner in which the liquor records pertaining to sales and purchases should be kept" (T. 258-259). The Court reread all of the instructions (T. 262-275).

The jury returned a verdict of guilty on both counts as to both petitioners. Petitioner Michaels was sentenced to imprisonment for one year on Count I, and each petitioner was fined $1,000.00 on each count (T. 277-278).

The Court below ruled that intent is not an element of the offense charged (App. 4).

## REASONS FOR GRANTING THE WRIT.

1. The Court below, in ruling that intent is not an element of the offense charged (App. 4), overlooked the history of the statute and the Court decisions on the predecessor statutes. Prior to the 1958 revision the penalty for violation of the requirement that a retail liquor dealer keep records of sales of liquor was a fine of $25.00. Section 5692, Int. Rev. Code of 1954, *supra*. Yet it was held

that the statute required intent in the sense of a bad purpose. **One 1941 Buick Sedan v. United States**, 10 Cir., 158 F. 2d 445.

Until the 1958 revision, there were two statutes concerning record requirements of wholesalers, one dealing with violations with intent to defraud the Government (Sec. 5620, Int. Rev. Code of 1954, *supra*; Sec. 2841, Int. Rev. Code of 1939) and the other dealing with failure to keep such records without any reference to intent (Sec. 5621, Int. Rev. Code of 1954, *supra*; Secs. 2857 and 2859, Int. Rev. Code of 1939). Former section 5621 provided that "Every distiller, rectifier, and wholesale liquor dealer who refuses or neglects to keep the records required * * * shall pay a penalty of $100.00 and, on conviction, shall be fined not more than $5,000.00 and imprisoned not more than three years." The Courts held that the latter statute required the element of intent. **Brink v. U. S.**, 6 Cir., 148 F. 2d 325; **Keith v. U. S.**, 5 Cir., 250 F. 2d 355; **U. S. v. Monarch Distributing Co.**, 7 Cir., 116 F. 2d 11. See also **Felton v. U. S.**, 96 U. S. 699, 24 L. Ed. 875. The present law, 26 U. S. C. A. 5603, is a codification of Sections 5620, 5621, and 5692 of the Int. Rev. Code of 1954 (U. S. Cong. and Adm. News, 1958, pages 1675-1676, 4580-4581). Obviously subsection (a) of Section 5603 is patterned after former Section 5620, and subsection (b) after former Section 5621. Thus, Congress intended that subsection (b) contain the element of intent which the Courts had previously held it contained.

The principle enunciated by the Court below as to the lack of intent in some crimes *mala prohibita* applies only when Congress evidences a desire to omit intent as an element of the crime (**Edwards v. United States**, 5 Cir., 321 F. 2d 324; **Reyes v. United States**, 9 Cir., 258 F. 2d 774, 784), and where the penalties, unlike here, are relatively small. **Morissette v. United States**, 342 U. S. 246, 256; **Edwards v. United States**, supra.

> "Congress did not intend that a person by reason of a bona fide misunderstanding * * * as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." **United States v. Murdock**, 290 U. S. 389, 396, 54 S. Ct. 223, 78 L. Ed. 381.

At the trial government counsel argued that the reason the petitioners did not keep and produce the invoices of purchases of the liquor was because of their carelessness in respect thereto (T. 237-238, 243-244), which he could not have done had the intent instruction been given. Since the petitioners kept detailed books as to their purchases and sales by which the invoices could be readily obtained from their suppliers, it seems clear that they were not attempting to hide any information with respect thereto or to defraud the Government. There was no evidence that petitioner Michaels knew that he was required to keep and preserve the invoices for the Federal government and his testimony was that he did not know of this requirement.

Although the petitioners did not object to the failure of the Court to instruct on intent, it is firmly settled that it is plain error to fail to instruct on intent. **Screws v. U. S.**, 325 U. S. 91, 65 S. Ct. 1031; **United States v. Massiah**, 2 Cir., 307 F. 2d 62, 71; **Mann v. U. S.**, 5 Cir., 319 F. 2d 404.

2. Count II of the indictment charged that between August 29, 1959, and August 31, 1961, the defendants failed to keep records of purchases of liquor (T. 250-251). Count I charged, and the case was tried on the theory, that on August 30, 1961, they failed and refused to produce for inspection by the agents the very records which Count II alleges they did not keep, each in violation of the same statute. They cannot be convicted of both. **Heflin v. United States**, 358 U. S. 415, 79 S. Ct. 451 (1959); **Milanovich v. United States**, 365 U. S. 551, 81 S. Ct. 728 (1961);

**U. S. v. Roach**, 3 Cir., 321 F. 2d 1. For petitioners could not produce for inspection that which they had not kept and could not be guilty of a crime for failing to do the impossible. Since an alternative instruction was not given, both counts should be reversed. **Milanovich v. United States**, supra; **United States v. Roach**, supra.

The Court below did not dispute this principle, but answered the contention by erroneous statements of fact (App. 7-8). Petitioners did not introduce any invoices at the trial (T. 11) and the only invoices ever found, or about which there was any evidence, were the 37 which were produced by petitioners for inspection by the Agents (T. 36, 61, 68). What petitioners did introduce at the trial was their books of account of all purchases (T. 11, 163-164, 168, 169), but the Government claimed, and the Court below held, that they were inadequate because they did not contain the quality and quantity of liquor purchased, though they had all other required information (T. 180).

## CONCLUSION

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX.

# United States Court of Appeals
## FOR THE EIGHTH CIRCUIT.

No. 17,137

| | |
|---|---|
| Michaels Enterprises, Inc., and James A. Michaels, Jr., Appellants, v. United States of America, Appellee. | Appeal from the United States District Court for the Eastern District of Missouri. |

(August 28, 1963.)

Before Vogel, Van Oosterhout and Ridge, Circuit Judges.

Ridge, Circuit Judge:

Appellants, Michaels Enterprises, Inc., a corporation, and James A. Michaels, Jr., its President, were convicted by jury verdict on both counts of an indictment charging, in Count I thereof, that the corporation was a retail dealer of distilled spirits, wines and beer, and "a person required to keep and file records, returns," etc., as required by Chapter 51, Title 26, U.S.C.A., and James A. Michaels, Jr., being its President "did fail and refuse to preserve and produce such documents so required to be kept" when demand for inspection thereof was made by investigators of the Alcohol and Tobacco Tax Unit, all in violation of Section 5603(b)(5), Title 26, U.S.C.A. Count II charged the corporation as being a person required to keep and file such records, and Michaels, being its President, "for fail-

ing to keep such documents and make required entries therein, to-wit, a record in book form of all distilled spirits, wines and beer received, or, in the alternative, to keep all invoices of, and bills for, all distilled spirits, wines and beer received" by Michaels Enterprises, Inc., in violation of Section 5603(b)(1), Title 26, U.S.C.A.

Sub-part E of Chapter 51, *supra*, imposes an "Occupational Tax" on "Retail Dealers" of distilled spirits, wines and beer. Section 5124(a)[1] thereof, relating to keeping of "records"; Section 5146(a)(b),[2] providing for the "preservation and inspection" thereof, and 5603(b)(1)(5),[3] imposing the penalty for failure to comply with the

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[1] "§ 5124. Records.

"(a) Receipts.—Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines, and beer received."

[2] "§ 5146. Preservation and inspection of records, and entry of premises for inspection.

"(a) Preservation and inspection of records.—Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

"(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

[3] "(b) Failure to comply.—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States, shall—

"(1) fail to keep any such document or to make required entries therein; or

"(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto; or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense."

mandate of the above sections, are the applicable statutes here to be considered.

By this appeal the following assignments of error are presented:

(1) "It was plain error for the Court to fail to instruct on intent";

(2) "It was plain error for the trial Court to fail to instruct the jury on the elements of the offense, or to tell the jury what it must find in order to convict the defendants";

(3) "Count I of the indictment was insufficient to inform the defendants of the charge against them";

(4) "As the defendants were convicted (on) Count II for failing to keep records . . . their conviction on Count I for failing to produce records for inspection by agents (of the Alcohol and Tobacco Tax Unit, when requested) cannot stand, since they cannot be convicted of failure to produce that which they did not keep or have"; and

(5) "The evidence as to intent was insufficient to sustain the verdicts." (Par. added.)

No exceptions, as required by Rule 30, 18 U.S.C.A., were taken to the charge to the jury as given in this case. Appellants admit they "did not object to the failure of the (District) Court to instruct on intent. Indeed (they say) the case was tried and argued (before that Court) on the theory that intent was not an element of the offenses." That such is and was the proper concept of the nature of the crimes for which appellants were indicted and found guilty is made manifest by these considerations. The statutes in question are regulatory measures enacted in the exercise of what is commonly called the police power, where emphasis is placed on a "knowing" violation thereof, rather than "intent" to commit an "omission of duty."

> "Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumes his responsibilities." **Morrissette v. United States**, 342 U. S. 246, 256 (1951).

Section 5603(b), *supra*, providing penalty for failure to comply with the record-keeping provisions of sub-part E of Chapter 51, *supra*, "otherwise than with intent to defraud the United States" is a regulatory measure, and lack of "intent" to violate the provisions thereof is not an essential element of the offense. **United States v. Behrman**, 258 U.S. 280 (1921); **United States v. Balint**, 258 U.S. 250 (1921). The statute creates a crime *mala prohibita* and not one *malum in se*. Lack of intent to violate the mandate thereof is no defense. **Morrissette v. United States**, *supra*; **Riss & Company v. United States**, 262 F.2d 245 (8 Cir. 1958); **Reyes v. United States**, 258 F.2d 774 (9 Cir. 1958); **United States v. Juzwiak**, 258 F.2d 844, 845 (2 Cir. 1958), *cert. den.* 359 U.S. 939. In the absence of "intent" from a statute such as 5603(b), *supra*, an implication of *scienter* is the most that may be inferred "where there is no reason to suppose the Congress, by deliberate choice, omitted such requirement." **Delaney v. United States**, 199 F.2d 117 (1 Cir. 1952). The trial Court in the case at bar charged the jury as to the appellants' "knowing" violation of the applicable statutes. That being so, it was not error to "fail to instruct on intent" as appellants here assert.

The evidence relating to appellants' violations of the revenue laws, *supra*, is not substantially in dispute. Tersely stated and without reference to detail matter appearing

in the record, it was established: . . . In August 1961, agents of the Alcohol and Tobacco Tax Unit went to Michaels Bar and Restaurant in St. Louis, Missouri, to make a retail liquor inspection and requested the bartender in charge to produce retail liquor "invoices" or records of all distilled spirits, wines and beer received by the corporate defendant for the previous two years. At that time, five or ten invoices were made available to them for inspection. They requested additional invoices, but were told the individual defendant, James A. Michaels, Jr., President of the defendant corporation, was not present but would return the next day. The agents returned the following day and requested defendant Michaels to produce for inspection the retail liquor records. He told them he would have to "dig them up" and that they should come back the next day. The agents returned the next day. At that time, thirty-seven retail liquor invoices were turned over to them for inspection by Michaels, only twenty of which were for the years 1959, 1960 and 1961. An additional request was made by the agents for any other invoice records. Defendant Michaels told them there were no others because they had been destroyed by a flood occurring in the basement of the premises. By other evidence, the Government established that during the critical period four hundred fifty transactions by wholesale liquor dealers were recorded as sales of distilled spirits, etc., made to the defendant corporation.

The evidence of appellants was to the effect that when distilled spirits, etc. were received at the defendant corporation's place of business, invoices therefor were placed on the back-bar until an accountant came and took them to his office to prepare financial statements of the corporation for income tax purposes. Subsequently, they were

returned to the corporate defendant's place of business and stored in cardboard boxes in the basement. In June 1961, the basement was flooded and all such stored bills and invoices for distilled spirits received by the corporation got wet and as a result thereof were removed and destroyed because of their unsanitary condition. For that reason alone, defendants asserted they were unable to produce the required records for inspection. However, the evidence of the Government established that certain invoices for purchases of distilled spirits, wines and beer received by the defendant corporation after the occurrence of the basement flood were not produced for inspection when request therefor was made by the agents. No explanation for that anomalous situation was attempted by any evidence adduced by appellants.

It has been so often reiterated that failure to except to "the charge or omission therefrom" as given, "stating distinctly the matter to which (one) objects and the grounds of his objection" (Rule 30 F.R.Cr.P., 18 U.S.C.A.), presents nothing for appellate review, so far as the charge to a jury in a criminal case is to be considered, that fortifying authorities should not be necessary. But see, **Gendron v. United States**, 295 F.2d 897 (8 Cir. 1961); **Johnson v. United States**, 291 F.2d 150 (8 Cir. 1961); **Rizzo v. United States**, 295 F.2d 638 (8 Cir. 1961); **Wegman v. United States**, 272 F.2d 31 (8 Cir. 1959); **Rosenbloom v. United States**, 259 F.2d 500 (8 Cir. 1958) **cert. den.** 358 U.S. 929; **Davis v. United States**, 229 F.2d 181 (8 Cir. 1956), cert. den. 351 U.S. 904; **Kreinbring v. United States**, 216 F.2d 671 (8 Cir. 1954).

There is nothing vague about the record-keeping provisions of Chapter 51, Title 26, U.S.C.A. as they relate to "retail dealers in liquor" and the "preservation" of rec-

ords by such dealers "for inspection by internal revenue officers during business hours," nor the penalty provided for failure to comply therewith. The charge as given to the jury in the case at bar was amply adequate to inform the jury as to the elements of an offense thereunder and "knowing" violation thereof. The charge specifically presented to the jury appellants' contention that if "the flooding of (the) basement and the . . . destruction of the records was caused by agencies or events entirely outside the control of (the) defendants" and for that reason their "inability . . . to produce (the) books and records on demand" was a result of that "fortuitous circumstance" etc., it "should acquit these defendants." In the light of the charge considered as a whole, there was no "plain error" therein as here asserted by appellants for the first time. Both counts of the indictment were couched in the mandate language of the applicable statutes, the provisions of which are concise, clear and basically simple. The citation of the specific provisions thereof was sufficient to inform the jury as to what facts it was required to find to establish the guilt of appellants. The defendants' contention that the jury was not sufficiently informed of what it should find to establish guilt of the charge made against them is without merit. It is sufficient for us because the District Court gave no erroneous direction thereby, absent a request for a more specific charge. **Stassi v. United States**, 50 F.2d 526 (8 Cir. 1931).

Concededly, the appellants failed to "keep" some of the documents and records they were required to maintain as provided in Sections 5124(a) and 5603(1) of Chapter 51, *supra*. At the trial of this case, certain "invoices" for distilled spirits were introduced into evidence by appellants. The contention was made that such were all the

invoices available to them which were not destroyed as a consequence of the flood. Evidence adduced by the Government was to the effect that some such exhibits introduced into evidence by appellants were not produced by them for inspection when requested by agents of the Alcohol and Tobacco Tax Unit at the time the agents appeared at the corporate defendant's premises. Hence, the evidence established that notwithstanding the contention made by appellants that some "invoices" kept by them were damaged by the flood, at the time of the inspection in question, they had other pertinent "invoices" in their possession which were not exhibited for inspection by the agents as required by the statutes, *supra*. Therefore, the evidence clearly established that appellants knowingly did not produce some invoices they did retain, for inspection when request therefor was made by the agents. **One 1941 Buick Sedan v. United States**, 158 F.2d 445 (10 Cir. 1946).

Appellants did not move for an acquittal at the close of all the evidence. No question of sufficiency of the evidence to support the verdict can now be made before this Court. **Rosenbloom v. United States**, *supra*.

The convictions appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## Judgment

United States Court of Appeals
for the Eighth Circuit.

No. 17,137. September Term, 1962.

Michaels Enterprises, Inc., and James A. Michaels, Jr.,
Appellants.

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgments and sentences of the said District Court, in this cause, be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court James A. Michaels, Jr., do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

August 28, 1963

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# In the Supreme Court of the United States

October Term, 1959

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Manhattan Eye, Ear & Throat Hospital, Inc., and James A. Merchant, Jr., Petitioners,

v.

United States of America

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ARCHIBALD COX,
*Solicitor General,*

EUGENE J. MALIS, JR.,
*Assistant Attorney General,*

BERNARD FERSTENFELD,
*Attorney,*
*Department of Justice,*
*Washington, D. C., 20530.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

---

No. 571

MICHAELS ENTERPRISES, INC., and
JAMES A. MICHAELS, JR., *Petitioners*

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8; C.A. 1-12) is at 321 F. 2d 913.[1]

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[1] The record consists of three volumes as follows: (1) the original files of the district court designated as "R."; (2) the transcript of the trial designated as "Tr."; and (3) the record in the court of appeals designated as "C.A."

## JURISDICTION

The judgment of the court of appeals was entered on August 28, 1963 (Pet. App. 9; C.A. 9). A petition for rehearing was denied on September 20, 1963 (C.A. 10). The petition for a writ of certiorari was filed on October 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether specific intent, including proof of knowledge of the law, is an element of the offense described in 26 U.S.C. 5603(b), relating to breach of the record-keeping requirements of the federal liquor laws.

2. Whether the evidence showed that petitioners failed to "keep" some documents, and kept but failed to "produce" others, thereby violating both paragraphs one and five of 26 U.S.C. 5603(b).

## STATUTES INVOLVED

26 U.S.C. 5124(a) provides:

> (a) Receipts.
>
> Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines, and beer received.

26 U.S.C. 5146(a) provides:

> (a) Preservation and inspection of records.
>
> Any records or other documents required to be kept under this part or regulations issued pur-

suant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

26 U.S.C. 5603(b) provides in pertinent part:

(b) Failure to comply.

Any person required by this chapter * * * to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States, shall

(1) fail to keep any such document or to make required entries therein; or

* * * * * * * *

(5) fail [or] refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

## STATEMENT

Petitioner Michaels Enterprises, Inc., is a corporate retail dealer in alcoholic beverages whose president is petitioner James A. Michaels, Jr. (Tr. 15-16, 18). The petitioners were convicted by a jury in the Eastern District of Missouri under the first count of an indictment charging them with failing to keep records of purchases of beer, wine, and liquor, in violation of 26 U.S.C. 5603(b)(1), and under a second count charging failure to preserve and produce such records, in viola-

tion of 26 U.S.C. 5603(b)(5) (R. 1-2, 23-24).[2] James Michaels was sentenced to imprisonment for one year and fined one thousand dollars on the first count, and fined an additional one thousand dollars on the second count; the corporation was fined one thousand dollars on each of the two counts (R. 37-38). The court of appeals unanimously affirmed (Pet. App. 1-8; C.A. 1-12).

The pertinent facts may be summarized as follows:

On Tuesday, August 29, 1961, two agents of the Alcohol and Tobacco Tax Unit entered petitioners' bar and asked to inspect the premises and to examine invoices of purchases of alcoholic beverages (Tr. 18-22). After being told that James Michaels was away on vacation, they were permitted to inspect the upstairs portion of the premises where five or ten invoices were found lying on the end of the bar (Tr. 20-22, 43). The person in charge told them that he did not know where the other invoices were kept, and that he did not have a key to the basement which was locked (Tr. 20-23). Later an attorney telephoned and asked the agents to postpone completion of their inspection until the next day, when James Michaels was to return from vacation (Tr. 24). The attorney also discussed obtaining the invoices for the agents (Tr. 49).

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[2] 26 U.S.C. 5603(b) incorporates by reference the provisions of 26 U.S.C. 5124(a) and 5146(a) which create in retailer dealers of alcoholic beverages a statutory duty to maintain either invoices or record books of purchases of beer, wine, and liquor. The books of record offered into evidence by petitioners at the trial did not contain the information required by Section 5124(a), and therefore the only issue before the jury was whether purchase invoices were kept or produced (Tr. 167-169, 180).

When the agents returned the next day, August 30, petitioner James Michaels was present and stated that he would have to "dig up" the invoices (Tr. 24-25). The agents went downstairs and inspected a portion of the basement, but found neither records nor invoices. They could not gain admittance to a locked room in the basement marked "office" (Tr. 25-28); petitioner Michaels stated that he did not have the key but might be able to find it (Tr. 28). After making several telephone calls and contesting the agents' right to inspect, petitioner announced that he was leaving the bar for the purpose of seeing his lawyer and obtaining a key (Tr. 28-30, 63). The agents waited until 11:30 p.m., seven hours later, but he did not return. During their wait, petitioners' counsel again telephoned, and the agents asked him to have petitioner Michaels return (Tr. 30).

The next afternoon, August 31, petitioner, in the presence of the agents, unlocked the door to the "office" (Tr. 33-35, 190). The room—which was neither dirty nor dusty—contained a small bar, desk, filing cabinet, and an extension telephone which rang during the inspection (Tr. 54, 80, 191). After escorting the agents inside, petitioner left the "office", climbed up on a pile of furniture in the portion of the basement inspected by the agents on the previous day, and returned with a box containing thirty-seven invoices (Tr. 35, 68). In answer to a request for the rest of the invoices, petitioner stated that he had no more and suggested that they had been destroyed by a flood in the basement (Tr. 36, 50, 61-62).

At the trial, petitioners offered evidence that the basement had been flooded first in March and again on June 23, 1961 (Tr. 144-145, 148-150, 194-197). The

government showed that petitioners should have had invoices for 483 purchases between August 31, 1959, and August 31, 1961, and furthermore that twelve purchases had been made since June 23, 1961, the date of the alleged flood, for which there were no invoices among the thirty-seven produced for the agents (Tr. 87-113, 20 212, 225-226). The case was submitted to the jury under instructions to acquit petitioners if it found that all the records had been lost in the flood (Tr. 252-253).

**ARGUMENT**

1. Contrary to petitioner's contention, the jury was not instructed that 26 U.S.C. 5603(b) did not require an element of intent. The jury was charged that petitioners were to be acquitted unless they "knowingly failed to keep" and "knowingly failed and refused to produce" their invoices of purchases of alcoholic beverages, and that petitioners were not guilty if all the records had been lost in a flood (Tr. 251-253). The statute was therefore not construed to be within the class of public welfare offenses which impose strict criminal liability regardless of intent. Compare *United States* v. *Dotterweich*, 320 U.S. 277; see generally, *Morissette* v. *United States*, 342 U.S. 246, 250-263. Since a specific intent to defraud is not, under the language of the statute, an element of the crime, the instructions on intent were sufficient.

Petitioners argue that these must be proof of knowledge of the law and that failure to charge thereon should have been deemed plain error under Rule 52. It is, however, well established that ignorance of the law is not normally a defense to crime. *E.g.*, *Ellis* v. *United States*, 206 U.S. 246. While this principle is

not applicable to certain statutes which punish a wilful violation of a statutory duty—such as wilfully evading the payment of taxes, see *e.g.*, *United States* v. *Murdock*, 290 U.S. 389, and *Edwards* v. *United States*, 321 F. 2d 324 (C.A. 5)—the exception is a limited one. The statute here involved, which applies without a specific intent to defraud, is not within that limited class. Nor is this a statute where knowledge of the law must be deemed an element as a matter of due process. See *Lambert* v. *California*, 355 U.S. 225. The instant statute is an integral part of the enforcement of taxes on the sale or distribution of alcohol. This business has been subject to taxation for many years. One who engages in the tavern business, particularly one who, like petitioner, has been in it for nine or ten years (Tr. 202), is properly held to the obligation to know of the statutory regulations which bear upon the conduct of that closely regulated business.

2. Although no objection was taken at the trial, petitioners claim that it was improper to convict them both for failing to keep records under 26 U.S.C. 5603 (b)(1), and for failing to preserve and produce these records under 26 U.S.C. 5603(b)(3). The convictions, however, were neither inconsistent nor duplicative, for the evidence was more than adequate for the jury to find that some invoices were not kept, and that others were kept but not produced. After a delay of three days, petitioner produced thirty-seven invoices (Tr. 35, 68). It could be inferred from petitioner James Michaels' evasive conduct that the failure to produce the records on the second day was intentional. Specifically, petitioner Michaels told the agents on the

second day that no more invoices could be produced until he obtained a key to the locked office; yet the invoices were finally discovered on the third day outside the office in an area of the basement previously inspected by the agents (Tr. 24-30). Apart from those thirty-seven invoices, there were other invoices which should have been in petitioners' possession but which were never produced (Tr. 87-113, 207-212, 225-226). The jury could properly infer that those invoices had not been kept.

In any event, there is no inconsistency between the two counts of failing to keep and failing to produce records. At most the crimes are duplicative in the sense that a person who fails to keep records is necessarily unable to produce them. Therefore, if we should be incorrect in our view that the evidence shows that some records were not kept, and others were kept but were not produced, the proper disposition would be to vacate sentence on the second count for failing to keep records, rather than to reverse the convictions on both counts. The cases cited by petitioners (*Milanovich* v. *United States*, 365 U.S. 551, and *Heflin* v. *United States*, 358 U.S. 415) involved convictions for robbery and receiving stolen property, offenses which are logically inconsistent with each other because a receiver is defined as a person other than the thief. See *Cartwright* v. *United States*, 146 F. 2d 133 (C.A. 5). Because it was for the jury to decide which of the two inconsistent positions was established by the facts, the conviction in *Milanovich* was reversed. A different result has been reached in the case of bank robbery offenses, such as those involved in *Prince* v. *United States*, 352 U.S. 322, where the crimes were merely

duplicative rather than inconsistent. In that situation, if two sentences are imposed, the lesser is vacated.[3]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
*Attorney.*

NOVEMBER 1963.

[3] The distinction between inconsistent and included offenses finds support both in case law and in contemporary scholarship. *United States* v. *Lawrenson*, 298 F. 2d 880, 889 (C.A. 4), certiorari denied, 370 U.S. 947; See *Model Penal Code* (Tent. Draft No. 5), Sec. 1.08.

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